Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

No. 96-402

In the Supreme Court of the United States

OCTOBER TERM, 1996

LISA LEE MINES (TERRILYNNE COAL COMPANY),
PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Black Lung Benefits Act (BLBA or Act), 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners "who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). The Secretary of Labor has promulgated regulations governing the award of benefits under the Act. If a miner's claim for benefits has been finally denied, any subsequent (or "duplicate") claim "shall also be denied, on the grounds of the prior denial, unless the [district director] determines that there has been a material change in conditions." 20 C.F.R. 725.309(d). This case presents the following questions:

1. Whether 20 C.F.R. 725.309(d), by permitting the filing of some duplicate claims more than one year after the denial of a previous claim, violates 33 U.S.C. 922, as incorporated into the Act by 30 U.S.C. 932(a), which imposes a one-year limitation on requests for modification of a denial of a benefit claim.

2. Whether the court of appeals correctly held that the claimant in this case had established "a material change in conditions," within the meaning of 20 C.F.R. 725.309(d), where the evidence showed a definite progression of his pneumoconiosis and a change in his work status since the denial of the earlier claim.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-20a) is reported at 86 F.3d 1358. The opinion of the court of appeals panel (Pet. App. 21a-28a) is reported at 57 F.3d 402. The decision and order of the Benefits Review Board (Pet. App. 29a-37a) is unreported. The decision of the administrative law judge (Pet. App. 38a-44a) is reported at 15 Black Lung Rep. (MB) 3-735.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 19, 1996. The petition for a writ of certiorari was filed on September 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (BLBA or Act), 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners 'who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). "Disability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987); see 20 C.F.R. 718.202-718.204. The BLBA provides that "except as otherwise provided in this subsection or by regulations of the Secretary" of Labor, the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, "shall * * * be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine." 30 U.S.C. 932(a). Pursuant to his authority under the BLBA, 30 U.S.C. 936(a), the Secretary has promulgated regulations governing the filing and adjudication of claims for such benefits. See 20 C.F.R. 725.301-725.422.

At issue in this case is the Secretary's regulation governing "duplicate claims"—*i.e.*, claims filed by a claimant after his original application for benefits. See 20 C.F.R. 725.309. If the claimant's original claim is still pending, the subsequent claim is deemed mer-

ged with the pending claim. 20 C.F.R. 725.309(d). If the original claim has been denied, but the subsequent claim is filed within one year of the denial, the subsequent claim may be treated as a request for modification of the decision denying benefits. *Ibid.*[1] If the subsequent claim is filed more than a year after the denial, the regulation provides that "the later claim shall also be denied, on the grounds of the prior denial, unless the [district director] determines that there has been a material change in conditions." *Ibid.*[2]

2. Respondent Alva Rutter filed a claim for BLBA benefits on July 1, 1986. Pet. App. 3a, 46a. On September 16, 1986, a claims examiner in the Department of Labor's Office of Workers' Compensation Programs (OWCP) denied Rutter's claim, on the grounds that the evidence submitted in support of the claim did not establish (1) that his pneumoconiosis was caused at least in part by coal mine employment or (2) that he was totally disabled by the disease. *Id.* at 48a-50a. Rutter, who was not represented by counsel, did not seek reconsideration or review of that denial. *Id.* at 3a.

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[1] Section 22 of the LHWCA, 33 U.S.C. 922, permits the filing of a request for modification of a denial of benefits up to one year after the rejection of a claim. The prior decision may be modified "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. 922; see 20 C.F.R. 725.310 (parallel Department of Labor regulation governing modification of black lung benefit award or denial).

[2] Section 725.309(d) refers to determinations made by a "deputy commissioner." A "deputy commissioner" is now referred to as a "[d]istrict [d]irector." 20 C.F.R. 725.101(a)(11); Pet. App. 3a n.4.

On April 25, 1989, Rutter filed a second claim. Pet. App. 46a. After reviewing the evidence submitted in support of the claim, an OWCP deputy commissioner found that Rutter had established a material change in conditions under 20 C.F.R. 725.309(d). Pet. App. 47a. The deputy commissioner further found that Rutter had "established his total disability * * * due to pneumoconiosis arising out of coal mine employment," and therefore awarded benefits on the claim. *Ibid.* Petitioner Lisa Lee Mines, the "responsible operator," 20 C.F.R. 725.492; Pet. App. 3a-4a, contested the award of benefits, arguing that Rutter had failed to make the requisite threshold showing of a "material change in conditions" since the denial of his previous claim. *Id.* at 3a-4a.

3. A Department of Labor administrative law judge (ALJ) issued a decision and order awarding benefits. Pet. App. 38a-44a. The ALJ first compared the medical evidence (including x-rays, pulmonary function and blood gas studies, and a medical examination report) concerning Rutter's condition in 1989 with similar evidence pertaining to his condition in 1986. The ALJ concluded that the evidence "show[ed] a definite progression of the disease occurring over another interval of time resulting in the Claimant's reduced capacity to do his former regular coal mine work." *Id.* at 42a.[3]

The ALJ further stated that Rutter would be entitled to an award of benefits even "[a]ssuming that the evidence is inadequate to establish a material change

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[3] Rutter had continued to work as a miner helper until May 1989, when he transferred to less demanding work as a beltman. He retired in January 1990. See Pet. App. 3a & n.3, 42a; Gov't C.A. Br. 8.

of condition." Pet. App. 42a. The ALJ explained that Rutter's 1986 x-ray readings showed complicated pneumoconiosis, triggering an irrebuttable presumption of total disability. *Id.* at 43a; see 20 C.F.R. 718.304. The ALJ concluded on that basis that OWCP's 1986 denial of benefits was beyond the scope of its authority and "void *ab initio*." Pet. App. 43a. Because there was "no decision in effect to which the doctrine of res judicata can apply," the ALJ awarded Rutter benefits commencing as of August 1, 1986, the first day of the month immediately after the filing of his original claim. *Id.* at 43a-44a.

4. The Benefits Review Board affirmed the award of benefits, with modification. Pet. App. 29a-37a. The Board first held that the ALJ had exceeded his jurisdiction in determining that OWCP's denial of Rutter's 1986 claim was void ab initio. The Board ruled that once Rutter had failed to request a hearing within 60 days after that denial, see 20 C.F.R. 725.410(c)(1), or to seek modification within one year, see 20 C.F.R. 725.310(a), the decision of the deputy commissioner became final. Pet. App. 33a. Petitioner's only recourse at that point, the Board explained, was to file a new claim, subject to the requirement that he establish a "material change in conditions" since the earlier denial. *Ibid.*

The Board affirmed the ALJ's award of benefits, however, based on its conclusion that Rutter had in fact established the requisite material change in conditions. Pet. App. 34a-35a. Relying on its prior decision in *Spese* v. *Peabody Coal Co.*, 11 Black Lung Rep. (MB) 1-174, 1-176 (1988), the Board explained that "in order to establish a material change in conditions pursuant to 20 C.F.R. § 725.309 claimant must present evidence which is relevant and probative so that there

is a reasonable possibility that it would change the prior administrative result." Pet. App. 35a (brackets and internal quotation marks omitted). The Board concluded that "the [ALJ's] finding is sufficient to support a finding of a material change in conditions pursuant to Section 725.309." *Ibid.* Because petitioner had not otherwise contested the ALJ's determination that Rutter was entitled to benefits, the Board affirmed the finding of entitlement. *Ibid.*; see also *id.* at 31a n.2.

The Board concluded, however, that the ALJ's award should be modified with respect to the date on which Rutter's entitlement to benefits would commence. Pet. App. 35a-36a. "[I]f the date of onset [of a claimant's disability] is not ascertainable from all the relevant evidence of record," the Board explained, "then benefits will commence with the month during which the claim was filed." *Id.* at 36a. Because the medical evidence did not indicate when Rutter became totally disabled, the Board modified the ALJ's date of onset from August 1, 1986, to April 1, 1989. *Ibid.*

5. A panel of the court of appeals vacated the Board's decision, holding that the Board had erred in concluding that Rutter had established a material change in conditions. Pet. App. 21a-28a. The standard applied by the Board, the court explained, "impermissibly allows a claimant to present—in addition to evidence tending to show that his condition has materially changed since the earlier denial of benefits, as contemplated by section 725.309(d) — evidence available at the time of the initial decision tending to show that the initial decision was in error." *Id.* at 25a. The panel also rejected a standard for evaluating "material change in conditions" proposed by the Director, OWCP. Under the Director's construction

of Section 725.309(d), a claimant alleging a change in conditions must prove with new evidence at least one of the elements of entitlement to benefits that was previously adjudicated against him. See Pet. App. 27a. The panel concluded that the Director's approach was "not a reasonable interpretation of section 725.309(d)" and therefore was not entitled to deference. *Ibid.* Under the Director's interpretation, the court stated, "once the 'material change' threshold is crossed by proving one of the elements previously adjudicated against the claimant, then all errors committed in the initial proceeding become reviewable. Effectively, therefore, the original decision denying benefits is reopened without a showing of actual material change." *Ibid.* (citation omitted).

The panel instead adopted a standard drawn from the Seventh Circuit's opinion in *Sahara Coal Co.* v. *OWCP*, 946 F.2d 554 (1991). The panel explained that in its view, "[a] material change in conditions means either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application." Pet. App. 26a (quoting *Sahara Coal*, 946 F.2d at 556). The panel remanded the case to the ALJ for reconsideration of Rutter's claim under that standard. Pet. App. 28a. The panel made clear that Rutter would be required to establish a material change in conditions with respect to each of the two issues (see p. 3, *supra*) previously adjudicated against him. Pet. App. 28a.

6. The court of appeals granted rehearing en banc and affirmed the award of black lung benefits to Rutter. Pet. App. 1a-14a. The court reasoned that

"[i]f the 1986 denial is 'final' in a legal sense, we must accept the correctness of its legal conclusion—Rutter was not eligible for benefits at that time—and that determination is as off-limits to criticism by [Lisa Lee Mines] as by [Rutter]." *Id.* at 5a-6a. Accepting as correct the first deputy commissioner's determination that Rutter was not entitled to benefits as of 1986, the court concluded that "Rutter has shown a stark change in condition, and he is entitled to have his 1989 claim decided on its own considerable merits." *Id.* at 7a.

The court next addressed the competing interpretations of Section 725.309(d). The court first rejected the panel's approach, explaining:

> The *Sahara Coal* test, as applied by the panel here, forces the claimant to show a material change on *every* element that was previously decided against him. This approach fails to account for the fra[il]ty of alternative holdings. A black lung claimant must prove every element of his claim. If he loses on one, or two, or three elements, the end result is the same: a denial. For this reason, if he loses on more than one element, but only one is in fact a correct basis for denial, the law does not impose a duty upon him to file a meaningless appeal to "correct" the erroneous alternative holdings.

Pet. App. 9a-10a (footnote omitted). The court also rejected the test employed by the Board, explaining that that approach was "too vague to be applied consistently, contains illogical evidentiary rules (it permits resort to evidence available before the prior denial and forbids consideration of contrary probative evidence), and arguably sets too low a threshold ('reasonable

possibility') to discern 'material' changes in condition." *Id.* at 11a. The court concluded that "[t]he Director's approach strikes a reasonable balance," and it therefore "defer[red] to the Director's reasonable interpretation of the duplicate claims regulation." *Id.* at 10a. It explained that

> pneumoconiosis—especially in the advanced form from which this claimant suffers—is a progressive disease, and no rational system of law or of medicine could stand on the proposition that it can or must be measured only once. A rational system would simultaneously account for the progressiveness of the disease, discourage useless appeals of alternative holdings, and require, at the threshold, a palpable basis to believe that conditions have changed over time. The Director's "one-element" approach accomplishes this difficult task.

Id. at 13a (footnote omitted).

Finally, the court observed that

> [i]n clinical terms, the change in [Rutter's] condition has been very real, even if we reexamine the 1986 evidence. The ALJ found that, in 1986, Rutter had small opacities of 2/2 profusion in four of six lung zones, with large opacities of category A (greater than one but less than five centimeters in diameter). By 1989, small opacities clogged all six lung zones, in greater profusion (2/3 to 3/2), and large opacities had progressed to Category B (greater than five centimeters). In 1986, notwithstanding his advanced disease, Rutter could work and support his family. Now he cannot. From Rutter's viewpoint, the change in his condition could scarcely be more "material."

Pet. App. 13a-14a. The court accordingly affirmed the award of benefits. *Id.* at 14a.

Judge Luttig, joined by five other members of the court, dissented. Pet. App. 16a-20a. The dissenters believed that the standard adopted by the majority would "invite[] claimants to file claim after claim until they find a pliant ALJ." *Id.* at 17a. Relying on *Sahara Coal*, the dissenters would have construed the duplicate claims regulation to require "that the claimant show, through a comparison of the evidence existing at the time of his original denial of benefits and the evidence currently available, that he was not then, but is now, eligible for benefits." *Id.* at 19a.

ARGUMENT

In recognition of the progressive nature of pneumoconiosis and the possibility that black lung claimants will continue to be exposed to conditions that cause the disease, the Secretary's regulations authorize the filing of successive claims for black lung benefits. Thus, even after the final denial of a claim and the expiration of the one-year period for the modification of such a denial, see 20 C.F.R. 725.310, a miner is entitled to file a new claim. In order to prevent repeated requests for awards based on the same evidence, the Secretary's "duplicate claims" regulation provides that a subsequent claim will be denied on the basis of an earlier denial unless the Department of Labor determines that "there has been a material change in conditions." 20 C.F.R. 725.309(d). Petitioner contends that (1) Section 725.309 is inconsistent with the governing statute and is therefore invalid, and (2) the court of appeals erred in concluding that Rutter had established a "material

change in conditions." Those arguments are incorrect and do not warrant this Court's review.

1. Section 22 of the LHWCA, 33 U.S.C. 922, authorizes a district director to review and modify a prior denial of LHWCA benefits "at any time prior to one year after the rejection of a claim." That provision is made generally applicable to BLBA cases by 30 U.S.C. 932(a). Petitioner contends (Pet. 14-15) that Section 725.309, by permitting the filing of some "duplicate claims" for black lung benefits more than one year after rejection of the initial claim, violates the one-year limitation for modification of awards set forth in Section 22.

a. The BLBA provides that specified provisions of the LHWCA, including Section 22, "shall (*except as otherwise provided in this subsection or by regulations of the Secretary* * * *), be applicable to each operator of a coal mine * * * with respect to death or total disability due to pneumoconiosis." 30 U.S.C. 932(a) (emphasis added). As the underscored language makes clear, the Secretary is authorized to promulgate regulatory exceptions to the general application of LHWCA provisions to BLBA cases. Thus, even if the Secretary's duplicate claims regulation under the BLBA had the practical effect of permitting modification of a benefits denial more than one year after the fact, the regulation would be a valid exercise of the Secretary's delegated authority. See *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502, 1506 (10th Cir. 1996) (holding that 20 C.F.R. 725.309 "properly preempts incorporation of 33 U.S.C. § 922's one-year limitation period").

b. In any event, an award of benefits on a subsequent claim pursuant to Section 725.309 is not properly regarded as a modification of the original denial.

Modification of a black lung benefits award or denial is governed by 20 C.F.R. 725.310, which provides that the district director "may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." 20 C.F.R. 725.310(a). Under Section 725.310, the original claim is readjudicated and benefits may be awarded from a date long before the previous denial was issued. See *Eifler* v. *OWCP*, 926 F.2d 663, 666 (7th Cir. 1991); 20 C.F.R. 725.503(b).

In contrast, 20 C.F.R. 725.309(d) does not authorize the reopening of a previously denied claim. A later claim that falls outside the one-year period of 20 C.F.R. 725.310 is treated as a new claim, and benefits cannot be awarded as of a date earlier than the denial of the first claim. That is clear from the instant case, in which the Benefits Review Board properly held that the ALJ was without authority under 20 C.F.R. 725.309(d) to declare void the initial denial of benefits and to make an award based on the filing date of Rutter's initial claim. See Pet. App. 33a-34a. Thus, even if the one-year period for modification established by 33 U.S.C. 922 were not subject to regulatory exceptions in BLBA cases, Section 725.309 would be valid.

c. It is implausible to suppose that Congress intended to bar every application for black lung benefits filed more than one year after a prior denial. Such a restriction would mean that a miner who misjudges his condition and prematurely files a claim will be forever barred from an award if more than one year passes between the denial and the onset of total disability. In light of the progressive nature of pneumoconiosis, Congress surely did not intend such

a result. Cf. *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 996 (6th Cir. 1994) (given the progressive nature of pneumoconiosis, "a claimant must be free to reapply for benefits if his first filing was premature").

d. As petitioner acknowledges (Pet. 14), there is no conflict in the circuits on this question. The only court of appeals to address the issue upheld Section 725.309 as a valid exercise of the Secretary's authority. See *Wyoming Fuel*, 90 F.3d at 1506; p. 11, *supra*. In the absence of a circuit conflict, the first question presented does not warrant this Court's review.[4]

2. As petitioner points out (Pet. 10-13), the courts of appeals have expressed disagreement regarding the standard for determining whether a claimant has proved a "material change in conditions" within the meaning of the "duplicate claims" regulation.[5] The

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[4] On November 27, 1996, the Court granted the petition for a writ of certiorari in *Metropolitan Stevedore Co.* v. *Rambo*, No. 96-272, which also presents a question concerning 33 U.S.C. 922's one-year limitation for requests to modify a benefit award or denial based on a change in conditions. We do not believe, however, that it is necessary to hold the petition in the instant case pending the Court's decision in *Metropolitan Stevedore*. That case involves the effect of a nominal benefit award on the one-year period for seeking modification, an issue quite distinct from the question presented here. As we explain above, moreover, 30 U.S.C. 932(a) authorizes the Secretary to promulgate regulatory exceptions to the general application of LHWCA provisions to BLBA cases. See p. 11, *supra*. The court's decision in *Metropolitan Stevedore* is therefore unlikely to affect the proper resolution of the instant case.

[5] The view of the Director, OWCP, is that a claimant who establishes with new evidence at least one of the elements previously adjudicated against him has thereby established a "material change in conditions" within the meaning of Section 725.309(d). See Pet. App. 8a. The Director's interpretation of the rule "is deserving of substantial deference 'unless it

petition for a writ of certiorari does not identify the legal standard that petitioner believes to be the correct one. In the court of appeals, petitioner relied upon the Seventh Circuit's decision in *Sahara Coal Co.* v. *OWCP*, 946 F.2d 554 (1991), in arguing that "[i]f review of the *old* evidence reflects that the prior denial was merely *mistaken*, then claimant cannot fall within the parameters of Section 725.309." Pet. C.A. Reply Br. 7. The dissenters in the court of appeals, also relying on *Sahara Coal*, similarly construed Section 725.309 to require "that the claimant show, through a comparison of the evidence existing at the time of his original denial of benefits and the evidence currently available, that he was not then, but is now, eligible for benefits." Pet. App. 19a. The apparent thrust of that argument is that a claimant seeking to invoke the duplicate claims regulation must prove that he was *not* entitled to benefits at the time of his previous application. Under that theory, a claimant whose original denial was erroneous is thereafter foreclosed from obtaining black lung benefits, even if his medical condition worsens substantially after the denial of his initial claim.

In fact, *Sahara Coal* establishes no such categorical rule. Early in its opinion, the *Sahara Coal* court stated that "[a] material change in conditions means either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his

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is plainly erroneous or inconsistent with the regulation.'" *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

disease has progressed to the point of becoming totally disabling although it was not at the time of the first application." 946 F.2d at 556. Taken in isolation, that sentence might well be read to suggest that a miner filing a subsequent claim must prove that he was not entitled to benefits at the time of his prior application. Later in its opinion, however, the Seventh Circuit expressly disavowed that conclusion:

> If having established that he is now totally disabled by black lung disease, the claimant also establishes that his present condition is substantially worse than it was the first time he applied, that should be enough to establish his entitlement. To require proof that he was not in fact totally disabled as a result of black lung disease [at the time of the earlier application], or that the extent of his disease or of his disability was unclear, would complicate the proceeding unduly. * * * But if the claimant is only slightly worse off now, he should be required to go further and show that he had missed the disability threshold the first time so that even a slight worsening could be and was a material change in his condition.

Id. at 558. Thus, taken as a whole, the opinion in *Sahara Coal* holds that a change in a miner's condition is "material" if either (1) the change is, in medical terms, "substantial[ ]"; or (2) the change, while "slight[]" in medical terms, is sufficient to take the claimant past the point of total disability. Only in the latter circumstance must the claimant demon-

strate that he was not entitled to benefits at the time of his previous claim.[6]

Once the limited nature of the *Sahara Coal* holding is understood, it is apparent that the outcome of the instant case would be the same under any of the standards espoused by the various courts of appeals. The courts of appeals are in disagreement with respect to two principal aspects of the "material change" inquiry. First, the courts disagree as to whether reexamination of the evidence presented in support of the prior claim is required in order to determine whether a "material change" has taken place. The Sixth, Seventh, and Tenth Circuits have concluded that it is. See *Sharondale Corp.*, 42 F.3d at 999 (ALJ is directed to consider on remand whether the x-rays that accompanied the second claim "differ qualitatively" from those submitted in support of the first claim); *Sahara Coal*, 946 F.2d at 556 (claimant must show that "his condition has worsened since the

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[6] The Seventh Circuit in *Sahara Coal* did not address the Director's "one-element" standard interpreting 20 C.F.R. 725.309(d) because the Director had not yet formulated that position. In *Peabody Coal Co.* v. *Spese*, 94 F.3d 369, 373 (1996), the Seventh Circuit was "ask[ed] to reject the *Sahara Coal* standard and embrace the more lenient standard advocated by the DOL and adopted by the Third, Fourth, and Sixth Circuits." The court of appeals declined "to address any differences between these two standards" because it found that the claimant met the *Sahara Coal* standard. *Id.* at 374. On November 25, 1996, the Seventh Circuit in *Spese* granted suggestions for rehearing en banc filed by the Director (who sought review of a separate panel ruling on merger of claims under 20 C.F.R. 725.309(c)) and by the employer (who sought review both of the merger question and of the panel's application of *Sahara Coal*). It is therefore possible that the en banc Seventh Circuit will revise or clarify the *Sahara Coal* standard.

first application"); *id.* at 558 (claimant may show material change in conditions by "establish[ing] that his present condition is substantially worse than it was the first time he applied"); *Wyoming Fuel*, 90 F.3d at 1512 (test is "whether, comparing evidence obtained after his prior denial to evidence considered in or available at the time of * * * his prior claim, [the miner] demonstrated that each of these elements previously found against him have [sic] worsened materially since the previous denial"). The Fourth Circuit in the instant case, by contrast, declined to endorse that line of inquiry. See Pet. App. 10a n.11.[7]

The Fourth Circuit also made clear, however, that it would uphold Rutter's award of benefits even if it believed that reexamination of the evidence submitted in 1986 was appropriate. The court observed that "[e]ven if we agreed with such a requirement [*i.e.*, that evidence in support of a subsequent claim must 'differ qualitatively' from evidence supporting the

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[7] As we explain above, see note 5, *supra*, the Director, OWCP, construes Section 725.309(d) to require the claimant to prove by new evidence at least one of the elements previously adjudicated against him. "New" evidence, in the Director's view, is evidence that was not available at the time of the earlier proceeding—*e.g.*, an x-ray taken after the initial denial of benefits. The claimant need not prove, however, that the new evidence "differ[s] qualitatively," Pet. App. 10a n.11 (quoting *Sharondale Corp.*, 42 F.3d at 999), from the evidence submitted in conjunction with the initial claim. We therefore agree with the Fourth Circuit that application of Section 725.309(d) does not require reexamination of the evidence considered during the initial proceeding. For the reasons stated in the text, however, we also agree with the Fourth Circuit that Rutter has established a "material change in conditions" even if a comparison between old and new evidence is an appropriate aspect of the inquiry.

initial claim], Rutter certainly satisfied it here, inasmuch as the ALJ found an actual deterioration in his condition." Pet. App. 10a n.11; see *id.* at 13a-14a (comparing x-rays taken in 1989 with those taken in 1986), 42a (ALJ concludes that "the medical evidence in 1989 shows a definite progression of the disease occurring over another interval of time resulting in the Claimant's reduced capacity to do his former regular coal mine work"). Because a comparison of the medical evidence available in 1986 with that submitted in 1989 reveals a substantial worsening of Rutter's condition, Rutter's award of benefits was proper whether or not Section 725.309 requires a comparison between the evidence supporting the duplicate claim and that supporting the initial claim. Resolution of the disagreement among the courts of appeals regarding the propriety of such a comparative approach is therefore unnecessary to the disposition of this case.

The courts of appeals also disagree as to whether a miner filing a subsequent claim must show a change in conditions with respect to all of the elements previously adjudicated against him. The Fourth Circuit in the instant case upheld the Director's view that "disproof of the continuing validity of just one of the alternative holdings is enough to establish a material change in condition." Pet. App. 10a.[8] The

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[8] The court of appeals explained that "if [a miner] loses on more than one element [of his initial claim], but only one is in fact a correct basis for denial, the law does not impose a duty upon him to file a meaningless appeal to 'correct' the erroneous alternative holdings." Pet. App. 10a. In the instant case, for example, Rutter would have had no incentive to challenge the 1986 claims examiner's determination that his pneumoconiosis had not been shown to have been caused by coal mine work (see

Third and Sixth Circuits have likewise sustained the Director's position. See *Labelle Processing Co.* v. *Swarrow*, 72 F.3d 308, 317-318 (3d Cir. 1995); *Sharondale Corp.*, 42 F.3d at 997-998. The Tenth Circuit, by contrast, has specifically criticized the Director's one-element test, *Wyoming Fuel*, 90 F.3d at 1511, and has held that "in order to bring a duplicate claim, a claimant must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied," *ibid.*

The claims examiner who denied Rutter's initial claim for benefits determined that Rutter had failed to prove either that his pneumoconiosis was caused at least in part by coal mine work or that he was totally disabled. Pet. App. 49a. Based on the ALJ's finding that "the medical evidence in 1989 shows a definite progression of the disease occurring over another interval of time resulting in the Claimant's reduced capacity to do his former regular coal mine work," *id.* at 42a, Rutter has established a change in conditions with respect to disability. Because Rutter continued to work as a miner helper from 1986 to 1989, see *id.* at 3a & n.3, he has also established a change in con-

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id. at 49a) unless he expected to prevail on the issue of disability as well. Indeed, as the court of appeals observed, a construction of Section 725.309 that required or encouraged such an appeal "might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening them." Pet. App. 10a (quoting *Restatement (Second) of Judgments* § 27 cmt. i (1982)). For that reason, a claimant who can demonstrate a material change in conditions with respect to one of the bases for denial of his original claim should then be permitted to argue that the other alternative holding(s) was/were incorrect when made.

ditions with respect to causation. Rutter therefore satisfies the requirements of Section 725.309(d) under either the Director's standard or the approach taken by the Tenth Circuit.

In short, petitioner can prevail only if Section 725.309(d) is construed to require the claimant to prove that he was *not* entitled to benefits at the time of his initial application. Although the dissenters in the court below advocated that approach, no court of appeals has adopted that interpretation of the governing regulation. The second question presented therefore does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1996